UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AMANDA COSTELLO, et al.,

Plaintiffs,

v. 13 Civ. 1359 (GHW)

KOHL'S ILLINOIS, INC., et al.,

Defendants.

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New York, N.Y.
January 22, 2015
5:00 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

HEPWORTH, GERSHBAUM & ROTH, PLLC
Attorneys for Plaintiffs
BY: MARC S. HEPWORTH

LITTLER MENDELSON, P.C.
Attorneys for Defendants
BY: RICHARD W. BLACK

(Case called)

THE COURT: Good afternoon. We are here to discuss your proposals with respect to the conduct of the second phase of discovery in this case. There are a number of issues, and I would like to try to address all of them today.

Let's start, if we can, with the overarching framework, which is the amount of time collectively that you have requested to conduct this discovery.

First, can you tell me, why nine months?

MR. HEPWORTH: When we met and conferred, plaintiffs' counsel had suggested six. Defendants' counsel had suggested nine. As a result, in an effort to come to an agreement on some issues, we mutually agreed on the nine months. This the reason between the two, not much more to it than that.

MR. BLACK: Your Honor, if I can clarify. Actually, when we met and conferred, defendants had initially taken the position that 12 months was appropriate. We ended up agreeing on nine months.

THE COURT: Thank you. Understood.

MR. BLACK: Yes, your Honor.

THE COURT: Good. I will just say at the outset that that is a very long amount of time, understanding that there is a lot of work to be done in this case. Look at the remainder of the requests through that frame.

Let's start, if we can, with I will call the category

of requests by the defendants for discovery. First, I would like to discuss the written discovery from the named plaintiffs. If I understand it, defendants want ten interrogatories, ten requests for production, ten requests for admission. Plaintiff wants five of each of those categories of requests.

Let me hear from each of you with respect to that. First, since defendant is asking for a number of them, let me ask you to please address this.

MR. BLACK: Yes, your Honor.

Your Honor, in considering the scope of written discovery on the named plaintiffs during second phase, we have taken into account the fact that we were able to serve interrogatories during the first phase. We did not, your Honor, reach the limit of our interrogatories and document requests to plaintiffs in the first phase.

We took that into account thinking, your Honor, that ten was a reasonable number with respect to the named plaintiffs for any additional issues that may arise during the second phase. In fact, your Honor, you will recall that the first phase was limited to conditional certification issues.

Your Honor, there are issues we want to ask the plaintiffs about. We didn't have an opportunity to before. We treated them differently than we have the opt-in plaintiffs because they are the named plaintiffs in the case.

THE COURT: Why ten, particularly with respect to interrogatories?

MR. BLACK: Sure. Ten interrogatories, your Honor, I believe we served ten before. That would give us 20 for the entire case toward the named plaintiffs, which, generally speaking, is a little less than we may have been entitled to otherwise.

Your Honor, when we think a little bit about what kind of questions we might ask, there are questions we might ask about the named plaintiffs about the opt-in group about information we learn about them that we couldn't ask of the opt-in themselves, which is the reason why that number is slightly higher.

THE COURT: Why do you expect that the named plaintiffs would have additional information as a whole or other members of the opt-in group?

MR. BLACK: Your Honor, some of these opt-ins may be folks that worked in the same stores. They may know a bit about what these people may did. They worked alongside them. To the extent they have the information, your Honor, we would like to probe that.

THE COURT: Thank you.

For my information, how do you envision staging delivery of your interrogatories and other written discovery requests to the named plaintiffs as opposed to the remainder?

Do you do the named plaintiffs first then the remainder, whatever I permit? How are you thinking about going about that?

MR. BLACK: Sure. Your Honor, I suspect there are some interrogatories we would serve right out of the gate on the named plaintiffs, and some more that we may serve after we get a little further down the road on opt-in discovery. It may be broken up.

THE COURT: Thank you.

Mr. Hepworth, you have countered five of each.

MR. HEPWORTH: I did, your Honor. Respectfully, with respect to counselor's comments, of all the issues here, I believe this is one of the more minor issues. I will say specifically that the first phase deposition of the named plaintiffs was a full seven-hour deposition. They even took the merits in that deposition and we did not.

Although at that point it was first phase, it wasn't like they were going to take whether or not these individuals were similarly-situated and then move forward in second phase and re-depose them. They have been fully deposed seven hours. If they used a little less time, off the top of my head, I don't recall, pretty close to that. They went into the second phase questions with respect to the merits in the first phase.I believe they propounded approximately 13 interrogatories and approximately 20 RFPs.

With respect to whether or not, I believe one of the comments Mr. Black said, whether or not these individuals may have worked alongside our individuals. They know the answers to that. At one point, they were either present employees or former employees of Kohl's. To the extent that Ms. Costello worked alongside one of the opt-ins, number one, they would know that. Number two, in our initial disclosures, as well in our responses, we listed everybody that our client -- we did not reserve our right to amend for second phase. We just said, here is all my clients' information, here is everything bates stamped, and here is everybody they know.

THE COURT: Thank you.

Let me turn to you, again, Mr. Black, with respect to written discovery from the opt-ins. I understand that they are going to be asked, in this case, that the defendant is seeking for five interrogatory requests for production and requests for admissions from each of the opt-ins. In other words, all of the opt-ins, whereas plaintiff is proposing five for each, for only the opt-ins who are deposed.

Can you explain to me, please, Mr. Black, why you think the written discovery is appropriate from all of the opt-ins? I am very interested in hearing what the nature of the questions are that you intend to ask. Mr. Hepworth made the point just now in his remarks, as he did in his letter, in some of the cases that he cited, that you, Kohl's, may be

capable of knowing some information. I am interested in knowing if you are asking about things that you could otherwise know through inquiry at Kohl's. Are you asking for something else?

MR. BLACK: Sure, your Honor. I can tell you, jumping right to that issue, we would be asking for something else, your Honor. The idea would not be to propound discovery on the opt-ins seeking information that we already have in our possession.

Your Honor, the backdrop against which we seek discovery of each of the opt-ins and very limited written discovery, your Honor, five interrogatories, five document requests, is that these individuals, your Honor, unlike a Rule 23 action, they are not absent class members. They are party plaintiffs and the Fair Labor Standards Act itself makes that clear. They are plaintiffs in a case.

Your Honor, that, we believe, should expose them to discovery. Part of Kohl's ability to exercise due process necessary to seek the certification to oppose a Rule 23 motion on the New York claims is that with respect to the individuals who are now plaintiffs in this case, part and parcel of Kohl's need to figure out what it is that these people know. Your Honor, with respect to some of the cases that were cited on both sides, I wanted to draw attention to a couple of things.

There was a case that was cited by plaintiffs' counsel

on the general notion that the discovery demands that Kohl's is seeking would defeat the purpose contemplated by Congress and authorized in collective actions. It is the Higueros case cited by Judge Boyle in the Eastern District. Your Honor, that all needs to be understood in context. I think the context of that decision informs a bit about the issue you have asked about, opt-in discovery, opt-in written discovery.

In that case, your Honor, the issue was not whether written discovery should be permitted to all the opt-ins. In fact, that had happened in that case already. The issue in that case had to do with whether the defendant would be able to depose all of the opt-in plaintiffs. It was entirely different issue. But, in fact, in that decision, your Honor, opt-in discovery had been served on all of the individuals. There is no shortage of decisions, your Honor, that permit that.

Going to your specific question, your Honor, we have dealt with those issues in the letters. I won't belabor it anymore. There are things, your Honor, that we believe these individuals would have in their possession in terms of information that we would not necessarily have, understanding that the mix of these opt-ins is largely former employees. So they're not folks for whom we currently have control or information or, in fact, information about them after they left Kohl's.

THE COURT: Can I just ask a question before you go

on?

MR. BLACK: Yes.

THE COURT: Do you have a statistic on that for me? In other words, what percentage of opt-ins are former versus current employees?

MR. BLACK: Your Honor, we looked at that back when the opt-in period closed on December 8. We have had a continuing run of opt-ins after the date. I haven't looked at it since then. I can tell your Honor that, at the time, the numbers were running upwards of 70 to 75 percent former employees as opposed to current employees, and we can certainly get the court the current numbers.

THE COURT: Thank you. That is satisfactory.

MR. BLACK: Your Honor, in terms of the information that we simply don't have at our disposal about these individuals, I want to preface this by referring the court to the Second Circuit's decision in Miners v. Hertz, which talks about the second phase in evidence, and it talks about what is important on decertification and what is important in Rule 23(b) analysis.

What Miners v. Hertz says is that this information, that is, the decision on whether these folks are similarly situated, whether they meet the requirements under 23(b) turns on what they actually did, not what we suppose they did, but what they actually did when they were employed at the

defendant.

We take that language to heart, your Honor. They are the only ones in a position to tell us what it is they claim they did, whether they claimed they spent their time performing large tasks or whether they agreed that they spent their time performing managerial tasks. What they, in fact, your Honor, have represented to other employees post Kohl's, both employers they were employed by and those they applied for employment with, is something that is solely in their possession.

In fact, your Honor, that would also be true of current employees to the extent they have a resume that is current. This is not speculation, your Honor, that there may be important information that is vital to decertification and Rule 23. Two of the plaintiffs in this case, your Honor, one opt-in and one named plaintiff, produced in discovery resumes and other documents, LinkedIn profiles. In fact, your Honor, they had plethora of information about the work they performed at Kohl's, the nature of those duties, which goes right to the question of what they actually did.

We don't know, your Honor, how many hours they claimed they worked, whether they are entitled to any overtime. We don't know who they believe has knowledge to support their claims. These people haven't been in the case before. We don't have disclosures from these folks. We don't know what the claims damages are. We don't know what kind of documents

they have to support the claim against Kohl's as a party plaintiff or that might support Kohl's defense.

Your Honor, we believe there are critical pieces of information, and that's why we narrowly tailored it to five requests.

THE COURT: Thank you.

MR. BLACK: I would say one more thing, your Honor.

THE COURT: Please do.

MR. BLACK: This ties into the deposition issue. Serving discovery on these individuals, A, I think is part of their duty as a plaintiff now. We also need that information to be able to determine who we are going to depose.

THE COURT: Thank you, Mr. Hepworth.

MR. HEPWORTH: There is a lot for me to address, but the first thing I want to address is, I think Magistrate Peck said it best -- and I attached my transcript where he specifically said on page 14 -- and no interrogatories. We don't do interrogatories in the Southern District.

There was no shortage of decisions that permit that. There actually is a shortage of decisions that permit that. The reason is, if you look at defendants' papers, there is not a single Southern District decision that permitted interrogatories. I cited Second Circuit and Southern District cases *ad nauseam*. If I had 20 pages, I could have kept on going. To the extent those cases existed, I'm sure Mr. Black

would have put them in there. They don't exist.

In the case of Scott v. Chipotle, Magistrate Netburn said no. In the case of EDS, the answer was no. In every case I cited -- I am not going to bore the court with every single case that I put forth -- the answer was no. So there is a shortage.

With that being the case, the defendant does cite a few cases. Respectfully, I would like to address those cases. In the case of Colotti v. St. Joseph, that is the only Second Circuit case they cite, there were 76 opt-ins. But what is perhaps most important, and the judge went into a lengthy soliloquy in the papers, there were 40 different job descriptions and departments. So how do you determine whether or not they are similarly situated if you only do 10, 15, 5, 2 percent, whatever the number may be, with 40 different job descriptions.

In Brooks v. Farm Fresh, again, not New York, there were 125 plaintiffs. That case was precertification. This is not where they are doing the depositions of opt-ins. It is misleading to cite that case. If you look at the caption, it is a monster of a caption, your Honor. There is 125 named plaintiffs.

With respect to Burkholder v. The City of Fort Wayne, that was not a judicial order; that was a stipulation signed by both parties where they mutually agreed and the judge so

ordered it.

I am not going to get into every case that the defendants cited. I am going to tell you that the law in this circuit, as indicated by Judge Netburn, as indicated by Judge Peck, as indicated by all the other cases that I have cited, there is no interrogatories on all the individuals.

Judge Boyle's words, as I said, specifically --

THE COURT: I don't want to interrupt your flow.

MR. HEPWORTH: That's okay.

THE COURT: At the same time, I think the law is that I have discretion to do what I think is appropriate with respect to constraining discovery. The rule is that generally the Southern District doesn't use interrogatories, as Judge Peck said. Again, I can change that if I think the situation is appropriate for it. Because as I understand it, you agreed to interrogatories with respect to the deposed opt-ins.

MR. HEPWORTH: Yes, your Honor.

THE COURT: The question is, why not interrogatories and other written discovery requests from the other opt-in plaintiffs?

MR. HEPWORTH: Sure.

THE COURT: The compelling argument, just so you know, one compelling argument that Mr. Black has made is that these are opt-in plaintiffs who have chosen to participate in this litigation affirmatively. Go ahead.

MR. HEPWORTH: There is a couple things to be said on that. I think the statistics Mr. Black gave is 75 versus 25. It is very telling. One of the major reasons that this is not done, present employees fear retaliation, as evidenced by the fact that we have 25 percent present and 75 percent pass.

That is the exact reason why Justice Peck, as well as the judge -- and I apologize for not following the judge's name -- in another Second Circuit case in Shahriar v. Smith & Wollensky said, experience has shown that opt-ins are generally concerned about retaliation when asked to participate in discovery.

Inevitably, the only real reason that defendants seek this discovery, and it was articulated in the transcript, it was articulated by Judge Netburn, it was articulated in Smith & Wollensky, there can only be one reason for it, and that is to persuade individuals from participating in the case.

THE COURT: Let me pause you on that.

MR. HEPWORTH: If I can say one thing, your Honor?

THE COURT: Not yet.

MR. HEPWORTH: I'm sorry.

THE COURT: Unpack that argument to me, because in this case, these plaintiffs who work at Kohl's have decided to participate in the case.

MR. HEPWORTH: Correct.

THE COURT: I will take as an assumption for purposes

of this discussion that that concern may have driven the skew in the overall participation rate. At this point, however, the 25 percent of plaintiffs in this case who are currently employed at Kohl's made an affirmative decision to engage in the case as opt-ins.

What that tells me is that since they have already made that step, that the additional burden of production associated with the defendants' request would result in the kind of intimidation or chilling that you are suggesting.

MR. HEPWORTH: I can only state the history, your Honor, that there is a reason that when individuals are called for depositions and/or they are called to propound interrogatories or RFPs, inevitably, quite a few drop out. I can tell you that in every FLSA I have been involved in, they have. That is the exact reason for the language, as contained in Netburn's decision, Judge Netburn, as well as Judge Peck's decision. There is a reason for that.

That is not the only reason. If I may, just specifically, Mr. Black noted who they are going to depose. Again, a reading of Magistrate Peck's decision, who was very familiar with these FLSA cases, it is not a pick-and-choose thing. They do not get to send out interrogatories and RFPs and go, guess what, we are going to depose A, B, and C. That is not the way it works.

Unless we are rewriting the law in the Second Circuit,

it just isn't how it is done. I realize that that is a broad, general statement. Your Honor, you are 100 percent correct. I want to get back to something that you said. You absolutely have broad discretion. I would never say the court does not have broad discretion.

I can only go by what the precedent is in all the cases that have been before me and my research. If I found a case, I would have said to your Honor, putting aside that one outlier, but I don't have that case. I can only go by the cases the defendants' cite, and I can only go by the jurisprudence that is in front of me, and I can only go by the decisions mentioned *ad nauseam* in my papers.

Every decision in this circuit has said no. It is not just this circuit. Even the decisions that the defendants cited, there were exceptions. They cited four. If I may, even the Goodman case, they were only entitled to do 35 out of 567 opt-ins, and in that one particular case, they gave an additional 25 for interrogatories.

So the overall statement is the defendants are going to say, depending upon your ruling down the road whether they get to pick them, whether they are all random, whether it is 50 percent, whatever the case may be, whatever that number is, those individuals are the ones who have opted in -- I'm sorry -- those are the individuals whose depositions will be taken and it is those individuals who will respond to the rogs

and to the RFPs.

I tell you this, your Honor, if they are going to truly seek -- this can only be seen as a slippery slope. If they are going to be seeking discovery to close to 500 individuals, conversely, if they are able to utilize their resumes, whatever the case may be, then that entitles me to the discovery for every single one of those individual stores, every single one that they worked for.

Mr. Black said, well, we want to see what they said to their coworkers. We want to see what they said in their job application. We want to hear what they said somewhere else. That's not the way it works. Because if that was the case, then I am going to get every store e-mail, every DM, and that not the way the FLSA works.

The purpose of the opt-in phase two, Phase one, FLSA, is such that you have a representative class. Those individuals are a representative sampling of the opt-in class, and that is how we would potentially proceed at a decert phase, a final cert phase, or a trial.

MR. BLACK: Your Honor, may I address a couple points that Mr. Hepworth brings?

THE COURT: Please do.

MR. BLACK: Your Honor, frankly, I don't know what to say about Mr. Hepworth's representation that in the Southern District or in the Second Circuit entirely, there are no

decisions that permit interrogatories in these type of situations. In fact, your Honor, the Chipotle decision, the Scott decision, Judge Netburn, I think that decision goes too far, your Honor, respectfully, in many respects. Judge Netburn permitted interrogatories in that case to the individuals who were receiving the discovery.

There are many other cases, your Honor. In fact, since Mr. Hepworth already agreed to allow interrogatories, I have to admit, this argument takes me a bit by surprise.

THE COURT: You don't need to address it further. I have read it.

MR. HEPWORTH: If you may, your Honor, I'm not saying they don't get any. Thank you.

THE COURT: Thank you. I understand that.

MR. HEPWORTH: Okay.

THE COURT: For me, the question is whether or not there is good cause for me to limit the discovery that is being proposed, is the way that I frame it. Each case is unique. For me, the question is whether or not the proposed limitations on defendants' process here are beneficial to the process of the case. I weigh the proposed constraints against the fact that these opt-in plaintiffs have chosen to participate in a lawsuit against the defendants.

Let me ask, while you are standing, if I can, Mr. Black, with respect to the number of depositions, you have

asked to depose up to 15 percent, where plaintiff wants to depose up to 5 percent. Can you please explain how and why you chose 15 percent as your proposed number?

MR. BLACK: Yes, sir.

Your Honor, we believe that 15 percent representative is a sufficient number of individuals to allow a cross section of cross positions, locations. Bearing in mind, your Honor, that this discovery in the second phase is not expressly geared toward decertification. We also have to prepare for a Rule 23 motion on the New York claims, your Honor.

The limitation that -- let me finish addressing your question which is why 15. Your Honor, that is a number we thought was reasonable. I will tell your Honor that we had proposed, as an area of potential resolution, 10 percent to Mr. Hepworth. Mr. Hepworth declined to agree to that, your Honor. We held our position at 15 in the letter.

Your Honor, the number that Mr. Hepworth has proposed, 5 percent, would represent just about 24 out of 500 opt-ins. That is, as your Honor already pointed out, individuals who made the affirmative decision to participate. As the Morganelli decision in the Eastern District pointed out, these are individuals, who by participating in this sort of lawsuit, have opened up themselves up and should respond to discovery.

We take that 24, your Honor, even if we were permitted to select the 24, which we absolutely believe we should be able

to for reasons we can get into when your Honor would like to hear it, even within that 24, your Honor. We have two positions at issue in the case. That might give us 12 AA ASMs, 12 CFH ASMs. We also have to take into account we would want to take some massive New York individuals to be able to deal with what we expect will be a Rule 23 motion on the New York claims. When we start to dissect that 24 down, your Honor, we all of a sudden get into a situation very quickly where we simply don't have enough depositions to be able to build the record and have due process, your Honor.

THE COURT: Please, go ahead, Mr. Hepworth.

MR. HEPWORTH: With respect to the percentage, they are obviously -- again, I am not going to go into it, your Honor, with respect to the case law that has been cited, but there is 2.6, there is 5 percent, there is 7 percent, there is 9 percent. In the EDS case, there was 60 out of 3000.

In the Pet Smart case I just litigated, not with Mr. Black but with his firm, there were 17 out of 333. A Family Dollar case I litigated with Mr. Black on a Rule 23, there were approximately 20 out of 1700 individuals.

So, again, you go by what the jurisprudence is in front of you. The Second Circuit, the Southern District, has indicated, and has stated in case law *ad nauseam*, that that representative sample, somewhere between 5 and 10 percent, has been seen as overwhelmingly enough. Motions for cert have been

granted, motions for final cert have been degranted and/or denied, motions for final certification have been granted and denied. That is the standard as it is in this circuit.

Again, when you go before the court, you go with what you have in front of you. The case law in the Second Circuit is overwhelming with respect to the representative basis, and not only just the Second Circuit, but it is throughout all the 13 circuits. Even with the Hoffman v. La Roche case in the Supreme Court, the judicial system benefits by efficient resolutions in one proceeding of common issues. You can vindicate your rights by the pooling of resources. That is what is happening here.

What I would like to say, and I just want to address one issue, that I believe the court gets, Mr. Black said I am surprised with Mr. Hepworth. I was never saying he doesn't get any interrogatories. My sole representation before the court, he gets the interrogatories for those individuals who have opted into the case and that are going to be deposed. I just want that abundantly clear on the record. I am not saying I am going contrary to a prior position.

THE COURT: Thank you. Understood.

With respect to the determination as to whom to depose, I did ask with respect to this, as I understand it, the defendant wants their right to choose all of those people who you to depose on behalf of Kohl's and plaintiff wants to

have -- call it a baseball type approach to selection of the people.

MR. BLACK: That's correct.

THE COURT: Could you please describe to me your position on this?

MR. BLACK: I would be happy to.

Your Honor, Kohl's position is that it has the right to develop its case and its defenses. Part of that, your Honor, in any case, is the ability to decide which witnesses you may seek to depose. I can't imagine the human cry that would go out if we were to suggest to plaintiffs' counsel that Kohl's should play a role in deciding who he gets to depose or who he doesn't get to depose. To unlevel the playing field just doesn't make any sense to us, your Honor. It restricts our ability to develop the evidence that we need.

One point, your Honor, that I think is well worth making and we made in our letter as well, there is a lot across all of the issues that we are dealing with of, as the term goes, do plaintiffs wants to have their cake and eat it too. They want it both ways.

When plaintiffs came before your Honor earlier in the case and sought conditional certification, they told your Honor that these individuals were all similarly situated to each other. Now they express concern about having defendants select witnesses on the theory that defendants might go out and

so-called cherry pick witnesses.

Either they are all similarly situated and it shouldn't matter who defendants pick or they're not, in which case this case should be decertified at some point. The plaintiffs can't have it both ways, your Honor. To allow plaintiffs for even a random sample to play a role here, your Honor, would simply step on Kohl's ability to develop the evidence and to proceed in the second phase.

When plaintiffs sought conditional certification, your Honor, they stood here, Mr. Hepworth stood here in front the court and told your Honor that if you just conditionally certify, we will send out notice and defendants will have an ample opportunity to make a fuller record in front of the court and seek decertification.

Your Honor alluded to that fact when your Honor granted conditional certification. They now want to limit it in every way possible, your Honor, and I find that to be inconsistent, and part of that, your Honor, is our ability to determine who we depose.

THE COURT: Thank you.

MR. HEPWORTH: If I may, your Honor.

We are seeking to limit in every way possible couldn't be seen as further from the truth. Although the one proposition is actually not in there, the additional proposition would be they all would be chosen randomly. To say

50/50, we are not saying we want our cake and eat it too. We are saying you choose 50, we choose 60. I believe the other was either a third, a third, a third, or 50 percent, 25 percent, 25 percent.

Regardless of the mechanism, we are not seeking to have our cake and eat it too. We are saying this is supposed to be a representative sampling. If you take 500 individuals, you divide it by -- let's say we are doing 25, you go down every -- I am making this up, obviously I am not a mathematician, I apologize -- every 20th letter, you pick that person, and that person is deposed for argument sake.

That is not plaintiff cherry-picking. I am not saying, nor is it me saying defendant is cherry-picking. What that is is a true representative sample. But more importantly with that, Mr. Black keeps going with what Mr. Hepworth said. What Mr. Hepworth said -- I don't recall saying that -- but what I will say is the defendants in the first phase, they could have produced individuals. They sought not to. There were named plaintiffs and they were deposed. The defendants could have noticed individuals to say, look, these people do things completely different. They sought not to.

But the idea that we are telling defendants that they have to adhere to the way we are saying it, that is not true. By this way, there is a chance that they say, you know what, there is 25 percent. I don't know if they are going to do

this. They may not. We are doing the 25 percent that are all employed.

Guess what, that might not be a representative sample. But if it is 25 percent by them, 25 percent by us, 50 percent of a random sampling, 50/50, another mechanism that enables it to be a true representative sampling, and that is how sampling is done. The scientific studies of sampling are not one person picks. That is not a sampling.

THE COURT: I would love to get longer into this conversation. First, how do you respond to what I expect will be Mr. Black's comment attributed to my question, if you do a random sampling, how do you address the fact that they have particularized concerns with respect to the New York Labor Law class action? You say we need to focus on New York plaintiffs. If he needs to choose a certain number of plaintiffs in New York, how do you address that concern if you are using a "randomized sampling?"

MR. HEPWORTH: Sure. My initial option was 50/50, but you could choose individuals in New York. But more importantly, that is not for a motion for decertification. That is actually not the case before the court.

Right now, the only thing before the court would be a potential motion for decertification by the defendant, as well as a potential motion for final certification. To the extent that I seek to bring a motion for Rule 23, which would be under

the state law of New York, I myself, Marc Hepworth, Hepworth, Gershbaum & Roth, have to show a cross sectional of those individuals in the State of New York. So that is going to go to my potential random individuals in the State of New York. The idea that Mr. Black is saying we have to oppose it, right now, there is nothing to oppose. They do not affirmatively move under the Rule 23. I do.

THE COURT: Why do you think that defendants have to contest the ultimate certification motion using randomized sampling of plaintiffs? Mr. Black's argument was -- I am summarizing it -- if these plaintiffs are not similar, they should be allowed to prove that they are not similar and using a randomized sample won't show the disparities among the plaintiff class.

MR. HEPWORTH: Sure. Well, the same way defendant says plaintiff wants their cake and eat it too, I could argue the same thing. By seeking a nonrepresentative sampling, they are just going to look for individuals who are potentially present employees and then they're going to go before the court, see, your Honor -- I am making this up -- there are only 25 AAs that have deposed, there have been no CFHs that were deposed. How do we know the CFH is the same as the AA? So as a result, these individuals are not similarly situated.

But if we go back to my original proposition, I didn't say just randomizing. I said you choose 50 percent, we choose

50 percent. This way, they can choose whomever they want for the 50 and they do the same thing. If anything, your Honor, that would potentially strengthen the case. If they think we think they are cherry-picking and vice versa, then clearly there is going to be disparate testimony amongst the individuals, which I can tell you is not going to happen, but that is what that could lead to.

THE COURT: Thank you. I think I have heard enough on that. Thank you.

With respect to the plaintiffs' discovery request, Mr. Hepworth, as I understand it, both sides agree that there will be 20 requests for admission. It is not completely clear to me what the defendants' position is with respect to plaintiffs' request for production. Your order says that plaintiffs shall collectively be permitted to serve up to a total of 50 requests for production, but the letter says 20. Can you tell me which number is correct?

MR. BLACK: Correct. There is a typo in the letter, your Honor.

THE COURT: It is 50?

MR. BLACK: Yes, your Honor.

THE COURT: In which case, the only question is with respect to the number of interrogatories, 25 versus 50 between plaintiff and defendant, and the number of requests for production, where I think that plaintiffs have asked for

unlimited for production.

Can I ask you, Mr. Hepworth, to speak to why you think both 50 interrogatories and unlimited requests for production are appropriate in this case?

MR. HEPWORTH: With respect to the RFPs, the request for production, the local rules, as well as the Federal Rules of Civil Procedure, do not give a number. So what I had advised Mr. Black was that I would adhere to the Federal Rules of Civil Procedure. I wasn't, in essence, saying that I am just going to send 1000 of them.

I have litigated numerous cases with other Littler Mendelson as a defense firm, I can just give an example, they have ranged anywhere between 40 and 60. But the reason why is because they know that the main reason is here and why the rules of civil procedure are what they are is because they know the sample group that they are getting.

In other words, they can say, we are seeking RFPs, notices to admit, interrogatories, on the potential opt-ins, so they know what they are asking for. I am asking for something, but then they could come back with it, and after an ESI conference and we are conferring tomorrow and after demands go out, very often, I want to say that 90 percent of the production is on behalf of the defendant. They are going to be producing the documentation. As a result, it is a deeper pool of documents than it is historically for the plaintiff.

As I mentioned in the first phase, we gave everything to the defendant that our clients have. Like I said, I am not seeking unlimited. I believe that is why, if you look at my proposal -- actually, it says plaintiffs shall be -- I am looking to adhere to the rules of civil procedure and the defendants are seeking to limit that to and that is not what the rules say.

THE COURT: Understood.

With respect to your request for 50 interrogatories, Mr. Hepworth, can you please explain that?

MR. HEPWORTH: Sure.

At this point, we don't know who the individuals are who defendants are seeking to produce in second phase. We are going to receive some discovery via the RFPs, then we are going to have a meet and confer, and then there are going to be, based upon whether it is a liability witness, willfulness witnesses, then we are going to have a better feel of who they are.

I mentioned this to Mr. Black when we had our conference. As I stand here, your Honor, if defense counsel mutually will agree to the number between 20 and 50 is 35, to take one matter off your docket, I will go that route.

THE COURT: Understood.

MR. BLACK: Would you like me to respond to that, your Honor?

THE COURT: Please.

MR. BLACK: Your Honor, let me cut to the chase. If we can agree to 50 document requests, we will agree to 35 interrogatories, your Honor. Take it off the plate.

The concern I have about the document requests, your Honor, is I can't rely on what Mr. Hepworth may or may not have done in other cases. The fact that he generally only serves a certain number, he is going to comply with the federal rules. As I recall, the federal rules don't set a limit on document requests. That usually is handled as part of a court conference.

Leaving it open like that, your Honor, is not something we think is acceptable, but if we can limit it to 50 document requests, we are willing to go to 35 interrogatories. Although I will note, your Honor, plaintiffs already served 16 interrogatories in the case and they were very broad. We responded to them already.

MR. HEPWORTH: With respect to the interrogatories that were served, maybe it should have been in the letter, many of those interrogatories were solely for first phase discovery. We are completely a new second phase for the same reason they are permitted, I said, serve five individuals on behalf of our own clients. They still did merits-based discovery on the named plaintiffs.

The amendment to what Mr. Black said was, to the

extent in the first phase wherein the defendant said in their interrogatories or RFPs we are saying that this is appropriate for second phase, I will be sending a followup letter and I will not be repetitive in my rogs, but if the defendants had originally responded this is more appropriate for second phase, my letter is going to say, please respond to rog and/or RFP, whatever number it is, as we are now in second phase.

THE COURT: Thank you.

Mr. Black, can I ask you whether or not you would be able to conduct the discovery that you have requested in less than nine months?

MR. BLACK: Your Honor, respectfully, I don't believe so. I will explain why.

At 15 percent of the deponents, your Honor, that would be approximately 70 out of 500 individuals. We would want to serve written discovery before we do so. That would take 30 plus days, your Honor, because we often don't get those responses in 30 days. If we serve them right out of the gate in the month we are in, more like two months in.

It is our experience, your Honor, that, as Mr. Hepworth mentioned, sometimes individuals don't respond. Individuals may decide to leave the case. If they do, they need to be replaced. Then we would start deposing these individuals once we had the benefit of the written discovery, your Honor. And even at 70, over the course of those months,

your Honor, that may require depositions every other day for four months to finish within the six months, your Honor. Frankly, your Honor, even at a firm of our size, that would be very difficult, given that our litigation team is rather tight.

Thus, the nine months, your Honor. Frankly, we thought more than that would have been necessary, but in the interest of trying to compromise, we are able to agree with plaintiffs' counsel on the nine-month period.

MR. HEPWORTH: If I may, your Honor.

Just to address a couple things that was said. I just want it on the record now. I am definitely going to come up against this in the future. The defendants are going to say, the ESI that you are seeking is cost prohibitive. We are not giving you what you want. We are making an application to the court and we are going to seek that you pay for X cost.

We, right now, based upon what we are seeking, it will not be cost prohibitive. My only point is, they are going to be seeking interrogatories from individuals, RFPs from individuals, notices to admit. For us to properly defend and prosecute our claim for all those individuals, there is going to be store- level ESI, higher-up ESI to wherever it goes. I don't want to have the argument down the road, no, counselor, that is cost prohibitive. This is their suggestion. This is their idea.

I know I mentioned it briefly in a footnote, and we

are not going to get into a ESI discussion today, but so when we have this conversation in a month, two months, three months, whatever the court's ruling is, it is here, it is on the record.

The one footnote I gave was the case, again, that our respective firms are litigating, was Pet Smart. There were 300,000 pages of ESI. 30,000 of them were actual documents. 270,000, approximately, were ESI for those 20 opt-ins. I just don't want to have that argument moving forward, when I approach defendants, I speak to the ESI people and say, look, you have to proceed ABC, you are seeking all the opt-in discovery, you are seeking 72 opt-ins.

Putting aside that is not permitted in the Second Circuit, I just want that on the record now that it is understood. More importantly, with respect to going less than six months, counsel is right. Littler Mendelson with, I think, over 1000 lawyers in their law firm is saying they are going to be hard pressed to do it. The whole point of the class and/or collective action is so that individuals can pool their resources. The Supreme Court came down with that decision.

By permitting 70 plus depositions, 500 approximate individual interrogatories, that is not a pooling of resources. That is taking everyone and doing it, and I am going to be perfectly frank with the court, and come back and probably do everyone's interrogatories and get it back to counselor in 30

days, we probably would be hard pressed.

MR. BLACK: Your Honor, may I address a couple of those points?

THE COURT: Please do.

MR. BLACK: Your Honor, first of all, one point I wanted to make earlier, I am glad Mr. Hepworth raised the point. This idea of pooling resources, or I think what Mr. Hepworth refers in his papers as representational proof.

I think we need to make clear one thing, your Honor. That is, there is no representative action here yet, your Honor. It is after the decertification motion that final certification on the FLSA claim is decided. We have a conditional certification in this case, your Honor. To the extent Mr. Hepworth's argument is this ought to be based on a representational proof and limit our discovery severely on that basis, your Honor, we are not there yet.

To the point Mr. Hepworth just made, your Honor, on ESI, I have been troubled today by Mr. Hepworth's reference to other cases we have handled against his firm. They're not this case. What I can tell you is, we often get into that battle, and I expect we will here too regardless, your Honor, of what you do with respect to the numbers of depositions, the number and extent of written discovery.

Mr. Hepworth's firm tends to seek very broad electronic discovery. We do get into those battles about cost

and preservation. I expect we will get into them here. I say that only, your Honor, because I don't want to sit here a month from now and have Mr. Hepworth try to throw back at me what he just said to your Honor. We may well be here on that issue, your Honor. It has nothing to do with what you decide.

MR. HEPWORTH: Can I say one thing, your Honor?

THE COURT: Yes, please.

MR. HEPWORTH: The court just said, and it just came down in Scott v. Chipotle, and it is on the second page of my papers and it is *ad nauseam* in this circuit: The court is not persuaded that limited or representational discovery will harm Chipotle's ability to maintain a full defense.

This is the important sentence: The FLSA envisions a collective action process in which claims of similarly-situated workers are adjudicated collectively rather than individually. That is the FLSA. That is the law in our circuit. Thus --

THE COURT: Thank you. I have heard enough.

MR. BLACK: Okay.

THE COURT: I am going to rule on this so that you can move forward in this case.

As Judge Netburn observed: "While a party must be afforded a meaningful opportunity to establish facts necessary to support his claim, quoting in re Agent Orange, the court has broad discretion to limit discovery, particularly when such discovery may be duplicative, more readily obtained from

another course, or when the burden or expense outweighs the benefits of discovery."

I am first, as an overarching point, going to accept the parties' agreement that nine months is the appropriate amount of time to conduct discovery in this case. It is an extensive amount of time, but I understand that both parties believe it is necessary. Given the scope of the litigation, I believe that it is appropriate.

Now, with respect to defendants' request for discovery, apologies to all the other courts in the Second Circuit who apparently decided the opposite, I am going to permit defendant to take the discovery that they have requested with respect to interrogatories for press or production and request for admission from the named plaintiffs and all of the opt-ins.

Now, with respect to the opt-ins, while I recognize the FLSA provides for collective action, we have not yet determined that this can proceed as a collective action. Each of the opt-in plaintiffs has made a conscious decision to become a plaintiff in this case. I am not willing to constrain the defendants' right to frame its defense in the way that it believes appropriate in the face of the action.

I think that there are natural constraints built into the overall cap on the amount of time that I am allowing for discovery, and with that constraint in time, I expect that,

despite defendants' resources, they will have to make some decisions about what scope of discovery is necessary. Rather than making an arbitrary decision to limit it, the scope of the discovery that they are taking, I am going to accept their proposals with respect to written discovery for named plaintiffs, from the opt-ins, the number of depositions, and the determination as to who to depose.

I do believe that defendants have the right to construct their defense, and I do not believe that there is an obligation for them to present, be constrained in their defense, through the selection of a random sample of defendants to depose. The issue here in front of me with respect to collective certification will be whether or not this group of plaintiffs was similarly situated. If defendant can prove that they are not, they should have the opportunity to do so.

Similarly, I am going to grant the plaintiffs' request for discovery as modified based on the discussion just now tentatively limiting the number of interrogatories to 35 and their request for production to 50. Both sides have agreed on 20 requests for admission.

Similarly, the defendants and plaintiffs have a difference of position with respect to the number of depositions that plaintiff can take in the case, and I am going to accept plaintiffs' proposal and allow them to take the depositions that they proposed in the proposed scheduling order

that was submitted to me. Overall, you are the masters of your cases. I am going to allow you to make your choices about how best to prosecute and defend it.

With respect to the issue of disclosure, which we did not discuss, namely, when each party will disclose witnesses that will be used in the motion practice. I am going to adopt what I am going to describe as a hybrid position. Plaintiff has asked that the defendants' supplement the Rule 26(a)(1) disclosures 75 days before the end of discovery. Given that, I expect discovery to be completed by the end of the second phase.

I appreciate the request for disclosure so the depositions can be completed before the end of the discovery phase. I am going to order that the defendants disclose those people no less than 30 days before the end of the discovery period so that the plaintiffs can take any depositions of those people that have not already been conducted and obtain discovery from them rather prior to the close of the discovery period.

With respect to the briefing schedule, you have both agreed on the timeline, which is to allow motions to be filed 60 days after the close of the post conditional certification discovery. Oppositions to the motion will be filed 60 days after service of the motion. The replies will be filed 30 days after service of the motion.

I have not yet heard your rationale for such an extended period for the oppositions. Barring a strong argument from you now, I am going to change that to 30 days.

MR. HEPWORTH: I can tell you now, your Honor, with respect to your ruling, there will now potentially be 72 depositions that have to be digested. So to the extent that the defendant puts forth, I just also want to note my objection on the record to your ruling and we will deal with it accordingly.

THE COURT: No, we will deal with it now. What is the basis for your objection?

MR. HEPWORTH: My objection to your ruling, your Honor, is the fact that it is usurping the local jurisprudence as well as the --

THE COURT: Explain that to me.

MR. HEPWORTH: The rulings in the Second Circuit have been that there is going to be representative discovery. I feel by allowing all 572, that is going contrary to what the FLSA has put forth. As I said, I am just noting my objection on the record, your Honor.

THE COURT: That is fine. You have noted your objection. You have not pointed me, just for the record, to any precedent that establishes anything but that I, the court, have discretion to confine discovery.

Each of the opt-in plaintiffs made a conscious

decision to participate in this litigation. The question is, do I impose upon the defendants' ability to defend themselves against this litigation by imposing the constraints that you have described.

I haven't heard that this will be and I don't believe that this will be a particular burden on any of the individual plaintiffs. I understand that it will be difficult for you as plaintiffs' counsel to address the concerns, but the issue here is that defendants should have the opportunity to defend themselves.

There is no precedent, that I am aware of, that constrains my ability to make a measured determination as to what constraints are appropriate in the discovery. So your objection is noted, but in the absence of anything other than data points about what other courts have done under other factual circumstances, in the absence of a case that says that I must do it in the way that you have described, I am going to do it the way that I have done it.

MR. HEPWORTH: I understand, your Honor.

THE COURT: Thank you.

MR. HEPWORTH: I believe you wanted me to address the 30 days?

THE COURT: Please do.

MR. HEPWORTH: So as a result of the potential 70 some odd depositions, as well as the potential 90 depositions on

behalf of the plaintiff, there is going to be about 160, 170 depositions that are going to potentially be in this case. As a result, when the motion for decert and/or final certification is done, that is going to take quite the digestion on the behalf of the plaintiffs as well as the defendants. Moreover, that is one of the reasons why, before the ruling, we had agreed upon 60 days.

Also, unless I am mistaken, depending on when this rule is officially the date, and I apologize, I am just trying to figure ahead, nine months is going to be October, which is going to bring us to holiday time. As a result, both parties have mutually agreed 60 days would be appropriate.

THE COURT: Thank you. Mr. Black?

MR. BLACK: Yes, your Honor.

I do agree with Mr. Hepworth that there is going to be a lot going into these oppositions. I am sure your Honor is familiar with them, but they are very robust filings involving lengthy briefing, complex issues, and many exhibits. That is the reason why we had proposed that time period, your Honor.

THE COURT: Thank you.

Then I will accept it. As for when I anticipate entering the scheduling order, what I would like to ask the parties to do, since you have done so well so far, is to send to me on my chambers e-mail account a Word version of the scheduling order that reflects the rulings that I just made.

I will order it. I will order it promptly. That will mean that you are, indeed, going to be beginning this process now. Let me say this to be clear. The nine-month deadline that I am establishing for completion of discovery is, in my view, an extended period of time, one that was agreed to by the defendants in full knowledge of the scope of the discovery that they are seeking to take.

I expect that the discovery will be completed by that date. I would extend it for good cause, but cause would have to be significantly good in order for me to grant an extension. You should expect to complete discovery by that deadline and you should schedule yourselves appropriately in order to ensure that you meet that deadline.

MR. BLACK: Your Honor, I had one question, one point of clarification.

THE COURT: Please.

MR. BLACK: I understood your Honor to rule that defendants must supplement the Rule 26 disclosures 30 days ahead of the end of discovery to identify individuals they may rely upon?

THE COURT: Correct.

MR. BLACK: We expect that plaintiffs will be filing their Rule 23 motion at the same time. In case you didn't say this, your Honor, it is --

THE COURT: I think it should be reciprocal, yes.

Do you have a view on that, Mr. Hepworth?

MR. HEPWORTH: No.

THE COURT: It will be reciprocal.

Is there anything else that we should discuss?

MR. BLACK: I don't believe so, your Honor.

THE COURT: Thank you very much. We are adjourned.

MR. HEPWORTH: Thank you, your Honor.

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